IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	No. 62909-3-I
	)	
Respondent,	)	
	)	
v.	)	
	)	
DAVID MUIR,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: February 1, 2010
	)	

Ellington, J. — David Muir was convicted of assault in the fourth degree and burglary in the first degree with an aggravated domestic violence finding. He appeals on several grounds, alleging ineffective assistance of counsel and impermissible comment on the evidence. We affirm.

BACKGROUND

In January 2007, Kimberly Wolfstone and David Muir began a tumultuous relationship. They lived together in Wolfstone's apartment with Wolfstone's five-year-old son, Dustin, from June 2007 until Muir moved out in February 2008. In April 2008, they began couples counseling.

By May 2008, Muir was again spending almost every night at Wolfstone's apartment and had brought back some personal items, which he kept in a drawer in her

dresser. He did not have a key to the apartment. Muir paid to have the internet reinstalled, but otherwise did not contribute financially.

On June 5, 2008, Wolfstone was at work. The couple had an argument via text messages. At one point, Wolfstone asked Muir if he was getting paid that day because she needed to pay rent; later she told him she "wanted him to move out."[1]

When Wolfstone arrived home, Muir was in the apartment. An argument ensued. Wolfstone repeatedly asked Muir to leave. He responded that he did not have to leave because he lived there. He called Wolfstone names, spat in her face, and threw her down on a bed and held her there while covering her mouth to muffle her screams. He let her up after a couple of minutes.

The next day, Wolfstone had the locks changed, called the police and provided a statement, and messaged Muir telling him about these developments. Muir twice showed up at her workplace seeking access to the apartment so he could retrieve his belongings. She offered to let him in when she got home from work. She arrived home to find the door frame splintered, the lock broken, and most of Muir's things missing, along with some of her own. She called police.

An officer responded to the scene. Wolfstone appeared to be angry. The officer explained to Wolfstone that Muir had established legal residency in the apartment. She initially challenged this assertion, but eventually "pretty much agreed that he had more or less established residency."[2]

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[1] Report of Proceedings (RP) (Dec. 3, 2008) at 57.

[2] RP (Dec. 4, 2008) at 215.

The lock was changed again, and a board was affixed to the doorframe as a temporary measure allowing the deadbolt to lock.

On the night of June 7, Wolfstone slept on the living room couch and Dustin slept in his bedroom down the hall. Around 3:00 a.m., Wolfstone heard someone ring the doorbell. She assumed it was Muir and ignored it. Shortly thereafter, Muir came crashing through the front door. Wolfstone grabbed her phone, but he took it from her. He was extremely intoxicated. When she asked him what he was doing, he responded, "I forgot my blankey."[3]

Wolfstone repeatedly asked Muir to leave. Eventually she began yelling at him, in hopes that a neighbor might hear her and call police. Muir grabbed her, threw her over the back of the living room couch, and covered her mouth with his hand. For about an hour, she struggled to get away. She eventually calmed down and Muir let her go. Both were crying. He told her she needed to fall asleep with him on the couch. Muir fell asleep, and Wolfstone took Dustin and drove to her parents' home in Redmond. Bellevue police found Muir at Wolfstone's apartment, still asleep and appearing intoxicated.

Muir was charged with burglary in the first degree, domestic violence, and two counts of assault in the fourth degree, domestic violence, one allegedly committed on June 5 and the other June 8. On the burglary charge, the State alleged an aggravating sentencing factor, that the offense involved domestic violence committed within the sight or sound of a minor child.

[3] RP (Dec. 3, 2008) at 91.

The jury acquitted Muir of the assault charge related to the June 5 event, but found him guilty of committing burglary and assault on June 8 and entered a special verdict finding that the burglary constituted an aggravated domestic violence offense.

DISCUSSION

Muir first argues his trial counsel was ineffective. To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced him.[4] Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness.[5] Prejudice is shown when the defendant establishes, with reasonable probability, that but for counsel's errors, the outcome of the proceedings would have been different.[6] The failure to establish either prong of the test is fatal to the claim of ineffective assistance of counsel.[7]

Muir argues that his attorney was ineffective because he failed to request a jury instruction defining "remains unlawfully." "A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or *remains unlawfully* in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person."[8] Under RCW 9A.52.010, "[a]

[4] State v. Thomas, 109 Wn.2d 222, 225–26, 743 P.2d 816 (1987).

[5] State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997).

[6] State v. Leavitt, 111 Wn.2d 66, 72, 758 P.2d 982 (1988).

[7] State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1986).

[8] RCW 9A.52.020(1) (emphasis added).

person 'enters or remains unlawfully' in or upon premises when he is not then licensed, invited, or otherwise privileged to so enter or remain."[9]

The court must instruct the jury on every element of a crime, but when to instruct the jury on the statutory definition of an element is a matter of discretion.[10] Generally, courts should define technical terms, but need not define words and expressions that are matters of common understanding.[11] That a word or an expression has been given a statutory definition does not necessarily mean it has acquired a technical meaning.[12]

Muir argues that "remains unlawfully" is a technical term and should have been defined for the jury, and that his counsel's failure to propose a definitional instruction constituted deficient performance. Muir fails to prove he was prejudiced by the absence of such an instruction.

The to-convict instruction required jurors to find that Muir remained unlawfully in a building on or about June 8, 2008. Muir's right to be present in Wolfstone's apartment was thus put at issue. During closing arguments, both the prosecutor and defense counsel argued the point extensively. The prosecutor argued that Muir was allowed at Wolfstone's apartment only with her permission, which he did not have on June 8. Defense counsel maintained the couple was living together and that Muir did not need Wolfstone's permission to be there.

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[9] RCW 9A.52.010(3).

[10] State v. Allen, 101 Wn.2d 355, 358, 678 P.2d 798 (1984).

[11] Id. A term is technical when it has a meaning that differs from common usage. State v. Brown, 132 Wn.2d 529, 611–12, 940 P.2d 546 (1997).

[12] State v. Scott, 110 Wn.2d 682, 691, 757 P.2d 492 (1988).

Muir argues the absence of a definitional instruction permitted the prosecutor to argue that Muir's presence was unlawful because he "didn't have permission"[13] to be in the apartment. But Muir does not explain how the instruction would have precluded this argument. The definition states only that presence is unlawful when a person is not licensed, invited, or otherwise privileged to remain. It does not answer whether a person evicted from another person's residence after a short and turbulent relationship has the right to return at will and can exercise that right by forcing the door.

In short, whether Muir was licensed, invited, or otherwise privileged to be in the apartment is exactly what the parties were arguing about, and we see no likelihood the instruction would have usefully informed the jury's consideration of the question. In light of the evidence and Muir's theory at trial, there is no reasonable probability the jurors would have reached a different conclusion had they been given the "remains unlawfully" instruction. There was no deficient performance by defense counsel.

Muir next contends the court impermissibly commented on the evidence in the jury instructions. A judge is prohibited by article IV, section 16 of the Washington Constitution from "conveying to the jury his or her personal attitudes toward the merits of the case," or instructing a jury that "matters of fact have been established as a matter of law."[14] The court's personal feelings on an element of the offense need not be expressly conveyed to the jury; it is sufficient if they are merely implied.[15] If a judge's

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[13] RP (Dec. 9, 2008) at 330.

[14] State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997).

[15] State v. Jackman, 156 Wn.2d 736, 744, 132 P.3d 136 (2006).

remarks constitute a comment on the evidence, a presumption of prejudice arises, which the State may then rebut.[16]

Here, all three to-convict instructions mirrored the information by designating the charges as domestic violence offenses (for example, "burglary in the first degree domestic violence"[17]). The State also alleged a sentencing aggravator, and the special verdict form asked the jurors to decide whether "[t]he crime of [b]urglary in the [f]irst [d]egree was an aggravated domestic violent offense.[18] The aggravating factor instruction states:

> To find that [b]urglary in the [f]irst [d]egree as charged in count I is an aggravated domestic violence offense, each of the following two elements must be proved beyond a reasonable doubt:
>
> (1) That the victim and the defendant were in a dating relationship;
>
> (2) That the offense was committed within the sight or sound of the victim's child who was under the age of 18 years.[19]

Muir contends that by referring to the charges as domestic violence offenses, the court commented on the evidence and effectively directed the jury to find the domestic violence aggravating factor,[20] relieving the State of its obligation to prove the domestic violence aggravator. For this argument, he relies upon school zone cases in which an

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[16] Id. at 743.

[17] Clerk's Papers at 54.

[18] Clerk's Papers at 41.

[19] Clerk's Papers at 60.

[20] Because a judicial comment on the evidence is an error of constitutional magnitude, such claims may be raised for the first time on appeal. State v. Levy, 156 Wn.2d 709, 719–20, 132 P.3d 1076 (2006); RAP 2.5. Thus, Muir's failure to raise the issue below does not preclude our review.

aggravating factor instruction identified a fact as established. These cases are entirely

inapposite. In State v. Levy, for example, the instruction advised the jury that a particular residence constituted a building as a matter of law.[21] In State v. Becker, the instruction identified a particular program as a school.[22] In contrast here, the jury was asked to decide whether the burglary offense was committed during a dating relationship and within sight or sound of a child. In stating the charges in the to-convict instructions, the court made no comment on these issues—one of which was undisputed.

Muir also relies heavily on State v. Hagler,[23] in which this court warned against informing juries that charges have been designated as domestic violence crimes:

> The jury's task is to decide whether the State has proved the elements of the charges beyond a reasonable doubt. A domestic violence designation under chapter 10.99 RCW is neither an element nor evidence relevant to an element. The fact of the designation thus does not assist the jury in its task. We can see no reason to inform the jury of such a designation, and we believe that prejudice might result in some cases.[24]

Hagler is distinguishable in several respects. First, Hagler did not argue that the references to domestic violence constituted a comment on the evidence by the court. Second, we do not see how this could be so. The references in both cases simply reflected the charging documents, and the juries in both cases were so advised. This is not a comment from the court.

Further, in Hagler there was no allegation of an aggravating sentencing factor.

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[21] 156 Wn.2d at 721.

[22] 132 Wn.2d at 64.

[23] 150 Wn. App. 196, 208 P.3d 32, review denied, 167 Wn.2d 1007 (2009).

[24] Id. at 202.

Here, the jury was required to decide not just whether Muir committed assault and burglary, but also whether the defendant and victim were in a dating relationship and the burglary offense was committed within the sight or sound of Wolfstone's son. The fact the crimes were charged as domestic violence offenses was, under the circumstances here, redundant. Although the court could have omitted the domestic violence language from the to-convict instructions, the jury still had to be instructed as to the domestic violence allegation. We can see no likelihood that the references were of consequence to the jury's understanding or its deliberations.

Finally, in Hagler we did not hold that every such reference is error. To the contrary, we expressed concern that the domestic violence references might, in some circumstances, cause prejudice. We found none in that case because of the evidence at trial and the undisputed fact of conduct constituting domestic violence. We also noted that prejudice was belied by the jury's acquittal on two charges, including one carrying the domestic violence designation.[25]

The situation here raises no concern about prejudice because, given the aggravated sentencing factor, the jury had to decide whether Muir's conduct constituted domestic violence in the presence of a child. And were we to have any concern, it would be, as in Hagler, belied by his acquittal on one of the domestic violence assault charges.

The domestic violence designations were not comments on the evidence, and Muir could not have been prejudiced by the designations in any event.

[25] Id. at 202–03.

In his statement of additional grounds, Muir contends the prosecutor committed misconduct when she told the jury that an owner "should be able to eject anyone from their house that they want to"[26] and thus misrepresented the meaning of "unlawfully remains." Defense counsel did not object. Failure to object to a prosecutor's improper remark constitutes a waiver unless the remark is so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.[27]

Muir bears the burden of showing that the prosecutor's remark was both improper and prejudicial in the context of the entire record and circumstances at trial.[28] It was neither. The remark simply reflected the dispute at trial over whether Muir was a resident of Wolfstone's apartment and entitled to be there at the time of the alleged burglary. The remark was not improper.

Finally, Muir contends defense counsel erred in not asking that the jury be instructed on self-defense.[29]

Counsel is not required to assert a defense not warranted by the evidence.[30] A

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[26] RP (Dec. 9, 2008) at 366.

[27] State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997)

[28] State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003) (citing id. at 718).

[29] Muir raises three other issues in his statement of additional grounds: a challenge to the charge of burglary in the first degree based on the U.S. Constitution article I, sections 9 and 10, a Sixth Amendment challenge to the sufficiency of the evidence standard of review, and a challenge to his criminal liability based on his status of allegedly illegally evicted victim. We have reviewed these additional grounds and find no merit in any of them.

[30] State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

defendant's use of nondeadly force against another is justifiable when the defendant reasonably believes he is about to be injured and uses no more force than is necessary.[31]

Muir relies on Wolfstone's testimony that on June 8 she hit him once while trying to push him out the door. This does not establish that Muir reasonably believed he was about to be injured, or that the force he used was necessary. Defense counsel was not deficient in not requesting a self-defense jury instruction.

Affirmed.

WE CONCUR:

[31] RCW 9A.16.020(3); State v. Kyllo, 166 Wn.2d 856, 863, 215 P.3d 177 (2009).